Supreme Court, U.S.
FILED

No. 00 662 OCT 12 2000

In The

Supreme Court of the United States

LARRY A. FULK,

Petitioner,

vs.

BILL HARBERT INTERNATIONAL CONSTRUCTION COMPANY, SUSAN WALKER HEESCHAN and LIBERTY LIFE ASSURANCE COMPANY OF BOSTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN F. KIZER, JR.
JOHN F. KIZER, JR., LLC
215 North Richard Arrington, Jr. Blvd.
Suite 301
Birmingham, Alabama 35203
(205) 324-1582
Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 cp

QUESTION PRESENTED FOR REVIEW

1. Did the United States Eleventh Circuit Court of Appeals deviate from its own precedent set in the following cases: *Kirwan v. Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994) and *Whatley v. CNA Insurance Company*, 1895 F.3d 1310 (C.A. 11 (Ala.) 1999), by affirming the trial court's granting of summary judgment in favor of the respondents and again by denying petitioner's petition for rehearing en banc?

PARTIES TO THE PROCEEDING

1. Larry A. Fulk
2. Bill Harbert International Construction Company
3. Susan Walker Heeschan
4. Liberty Life Assurance Company of Boston

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CITATIONS OF REPORTS AND OPINIONS

1. *Fulk v. Bill Harbert International Construction Company, et al.*, No. 99-12426 (11th Circuit Court of Appeals July 14, 2000) (denial of petition for rehearing en banc).

2. *Fulk v. Bill Harbert International Construction Company, et al.*, No. 99-12426-CC (11th Cir. Crt. of App. March 24, 2000) (order affirming the United States District Court, Northern District of Alabama, Southern Division opinion).

3. *Fulk v. Bill Harbert International Construction Company, et al.*, No. 99-12426, 2000 WL ___ (Ala. March 24, 2000)

4. *Fulk v. Bill Harbert International Construction Company, et al.*, No. 98-01076-CV-P-W (United States District Court of Alabama, Northern District, Southern Division) (order on plaintiff's motion for reconsideration, motion for partial summary judgment, and motion for remand and defendants' motions for summary judgment).

STATEMENT OF JURISDICTION

Jurisdiction, pursuant to 28 U.S.C. §1257, is premised on the fact that the Eleventh Circuit Court of Appeals has decided an important federal question in a way that conflicts with its own decisions and other United States circuit courts of appeals. On March 24, 2000 the Eleventh Circuit Court of Appeals entered an order affirming the lower court's decision. Petitioner timely filed his petition for rehearing en banc which was denied on July 14, 2000.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

1. The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 102(a)(1) [29 USCS §1022(a)(1)] . . . If there is a modification or change described in section 102(a)(1) [29 USCS §1022(a)(1)], a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan. 29 U.S.C. §1024(b)(1)

2. District court conducting de novo review of employee benefit plan administrator's benefits determination is not limited to facts available to administrator at time of determination. §502(a)(1)(B), as amended, 29 U.S.C.A. §1132(a)(1)(B)

3. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title. 28 U.S.C. §1291

4. Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the

extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title. 29 U.S.C. §1002(21)(A)

5. Requirement, that written procedure be followed for amending ERISA plan, is not applicable to plan terminations; applying requirement to plan terminations would not further purpose of the section containing requirement of ensuring that interested parties may determine at any time their benefits under plan, applying requirement to plan terminations would not further requirement's purpose that benefits, and notice and procedural requirements for terminating plan are sufficient to keep employees apprised of their benefits and to promote certainty with regard to terminations. (ERISA, §§402, 402(b)(3), 29 U.S.C.A. §§1102, 1102(b)(3), 1341)

6. Extraordinary Nature of Petitions for En Banc Consideration. A petition for en banc consideration, whether upon initial hearing or rehearing, is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional importance in an appeal or other proceeding, and, with specific reference to a petition for en banc consideration upon rehearing is intended to bring to the attention of the entire court a panel opinion that is allegedly in direct

conflict with precedent of the Supreme Court or of this circuit. Eleventh Circuit Court Rule 35-3

STATEMENT OF THE CASE

FACTS

The Petitioner was employed as a project superintendent for the respondent, Bill Harbert International Construction Company, ("BHIC"), from March 11, 1996 until September 18, 1997. At the time that the Petitioner was hired by the respondent, BHIC, his employment package included the following company sponsored benefit plans: Blue Cross/Blue Shield Health Insurance, Protective Life Dental Insurance (which was subsequently changed to Blue Cross/Blue Shield Dental with prompt pre-change notice to beneficiaries), Group America Life Insurance, Accidental Death and Dismemberment Insurance and Traveler's/Met Life long-term disability insurance. During Petitioner's term of employment with BHIC, the only long-term disability insurance policy ever given to him referenced the Traveler's Insurance Company as BHIC's long-term disability carrier. All of the office manuals and policy and procedure manuals provided to Petitioner referenced Traveler's as the long-term disability insurance. On or about August 1, 1995, the Traveler's Insurance Company's long-term disability contract with respondent BHIC was purchased by Met Life, and was given a separate group contract number. The Met Life policy had an effective date of August 1, 1995, and a termination date of

August 31, 1997. In August of 1997, BHIC made an executive decision to terminate the Traveler's/Met Life long-term disability policy.

At the time of the change from Traveler's to Met Life, there was no notice given to beneficiaries because there was no need for notification simply because respondent, Susan Walker Heeschan ("Heeschan") felt that there was no significant change in the benefits. In answer to Petitioner's interrogatory, "Please state whether or not you gave written notice to the covered employees when Bill Harbert's long-term disability insurance was changed from Traveler's to Met-Life and from Met Life to Liberty Mutual", respondent Heeschan states "I did not give written notice to BHIC employees when MetLife purchased Traveler's since there was no change in benefits. I did give notice to BHIC employees of the change from the MetLife long-term disability plan to the Liberty National Assurance Company of Boston plan". It was not until seven months after the Liberty Life policy was in effect, on the 9th day of April, 1998, the very same day that she was served with Petitioner's original complaint, that BHIC's plan administrator, respondent Heeschan gave notice of the new long-term disability carrier to the covered employees. On the 9th day of April, 1998, respondent Heeschan sent out a memo stating "Please find attached an updated booklet for Bill Harbert International Construction's group LTD benefits. As of September 1, 1997, Liberty Mutual is BHIC's LTD carrier. Please let me know if you have any questions regarding this matter."

On September 18, 1997, the Petitioner was terminated from his employment with respondent BHIC. On the morning of September 18, 1997, the Petitioner contacted

the plan administrator for BHIC, respondent Heeschan, and informed her that he wanted to file for his long-term disability benefits as provided by Traveler's Insurance Company. At that time, the Petitioner was informed by respondent Heeschan that his long-term disability coverage terminated on his date of termination. There was some argument between the Petitioner and respondent Heeschan regarding the dates that benefits were to remain available. The Petitioner was referring to the Traveler's Insurance, which extended the time to apply for benefits through the end of the month in which you cease to be an active employee. On September 22, 1997, the Petitioner and respondent Heeschan had another conversation wherein respondent Heeschan informed the Petitioner that BHIC had a new long-term disability carrier effective September 1, 1997. When the Petitioner finally received an application form for long-term disability benefits through Liberty Life, BHIC's new long-term disability carrier, he filled them out appropriately and sent them to respondent Heeschan per her request. Subsequently, he was denied benefits through Liberty Life based solely on the fact that benefits terminated at the time of his termination.

ARGUMENT

INTRODUCTION

Black's Law Dictionary defines precedent as "A decided case that furnishes a basis for determining later cases involving similar facts or issues." Once a court has set a precedent, it should remain binding unless the issues and facts of the case under review are not parallel

with the issues and facts of the precedent case(s). In the case now before this Honorable Court, the Eleventh Circuit Court of Appeals breached its set precedent by affirming the lower courts order although the issues, facts and arguments in *Fulk v. Bill Harbert International Construction Company, et al.*, 211 F.3d 600 (11th Cir. 2000) are significantly similar to those issues, facts and arguments in *Aldridge v. Lily-Tulip, Inc.*, 40 F.3d 1202 (11th Cir. 1994), *Kirwan v. Marriott Corporation*, 10 F.3d 789-790 (1994), and *Whatley v. CNA Insurance Company*, 1895 F.3d 1310 (C.A. 11 (Ala.) 1999) wherein each case was reversed and remanded by the appellate court deciding it.

Eleventh Circuit Court Rule 35-3 states:

> *Extraordinary Nature of Petitions for En Banc Consideration.* A petition for en banc consideration, whether upon initial hearing or rehearing, is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional importance in an appeal or other proceeding, and, with specific reference to a petition for en banc consideration upon rehearing is intended to bring to the attention of the entire court a panel opinion that is allegedly in direct conflict with precedent of the Supreme Court or of this circuit.

The substance of the following statement of this case and the facts and issues raised by this case will show to this Honorable Court that the Eleventh Circuit panel clearly breached a precedent set by it and subsequently broke one of its rules in the process.

WHEREFORE, petitioner petitions this Honorable Court for a Writ of Certiorari urging the Eleventh Circuit to closely review the case before it now and determine

whether or not the Eleventh Circuit Court of Appeals made a precedent-setting error in affirming the lower court's opinion and again in denying the petitioner's petition for rehearing en banc.

I. THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEALS DEVIATED FROM ITS PRECEDENT IN AFFIRMING THE TRIAL COURT'S DECISION.

The three Judge panel assigned to this case clearly erred in its decision affirming the District Court's ruling in this cause due to the panel's lack of consideration of the issues and questions of material fact raised by the Petitioner in his initial brief and reply brief to the Eleventh Circuit. The panel's opinion that BHIC "amended rather than terminated the plan when it switched insurance carriers" is completely erroneous. (App. 2) The termination of the Traveler's/MetLife long-term disability insurance policy as a matter of definition cannot be considered an "amendment", "modification", or "change" to an existing plan because the existing plan was terminated on the 31st day of August, 1997. In *Aldridge v. Lily-Tulip, Inc.*, 40 F.3d 1202 (11th Cir. 1994), the Eleventh Circuit Court stated:

> Requirement, that written procedure be followed for amending ERISA plan, is not applicable to plan terminations; applying requirement to plan terminations would not further purpose of the section containing requirement of ensuring that interested parties may determine at any time their benefits under plan, applying requirement to plan terminations would not further requirement's purpose that benefits, and notice

> and procedural requirements for terminating plan are sufficient to keep employees apprised of their benefits and to promote certainty with regard to terminations. (ERISA, §§402, 402(b)(3), 29 U.S.C.A. §§1102, 1102(b)(3), 1341)

The Eleventh Circuit has ruled that the procedures under ERISA for plan amendments are not applicable to plan terminations.

The Eleventh Circuit panel quotes *Donovan v. Dillingham*, 688 F.2d 1367, 1375 (11th Cir. 1982) in its defense of its opinion regarding BHIC, stating that "The purchase of a plan is only a method of implementing a plan . . . and is evidence of the existence of a plan but is not itself a plan." (App. 2) The panel concludes therefore, that BHIC and Heeschan did not act as plan fiduciaries. They base this reasoning on *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 763 (1999) and *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-91, 116 S. Ct. 1783, 1789-90 (1996) wherein both cases state that employers sponsoring ERISA plans do not, under 29 U.S.C. §1002(21)(A), act as fiduciaries when they "alter the terms of a plan." (App. 2) BHIC and Heeschan never altered the terms of any of BHIC's long-term disability policies. They simply terminated one plan, purchased a different plan and failed to notify their employees therefore acting as plan fiduciaries of the long-term disability policy.

The Eleventh Circuit panel contends that Liberty Life was the plan fiduciary and that it does not matter which standard of review is applied to the argument because Fulk raised no disputed issue of material fact regarding Liberty Life's refusal of long-term disability benefits. (App. 3) We strongly disagree. The District Court granted

Liberty Life's motion for summary judgment on the basis that the petitioner applied for benefits after he was terminated, that he did not inform BHIC, plan administrator Heeschan, Met Life or Liberty Life of his intention to apply, and that an employee must be disabled prior to applying for benefits under the Met Life and Liberty Life policies. (App. 12) As stated previously, the petitioner believed that the long-term disability insurance provided to him by BHIC was Traveler's/Met Life. The petitioner knew that under the Traveler's/Met Life policy, he had until the end of the month in which he ceased active employment to apply for long-term disability benefits. When the respondent, BHIC, terminated the Traveler's/Met Life policy without the petitioner's knowledge, that option was no longer available to him. The petitioner notified respondent Heeschan on the 18th day of September, 1997, that he wanted to file for long-term disability benefits under Traveler's/Met Life. He followed the procedures of applying for said benefits through the office manuals and handbooks provided to him by BHIC. The only entity the petitioner was required to inform of his desire to apply for benefits was respondent Heeschan, as BHIC's plan administrator.

The petitioner was disabled prior to his termination. The petitioner provided to the District Court a sworn affidavit from his primary care physician, Dr. Roger Moraski, who stated:

> In July of 1996, Mr. Fulk (petitioner) had a coronary arteriography that revealed that two of the three previous bypasses were occluded. At that time, it was my opinion that Mr. Fulk was totally disabled and I advised him to apply for

> disability. Due to a self-imposed obligation to his employer, Mr. Fulk continued to work. Therefore, I adjusted his medications in order to make him as comfortable as possible while he continued to work.

In *Kirwan v. Marriott Corporation*, 10 F.3d 789-790 (1994) the Eleventh Circuit states:

> The district court in this case had before it Kirwan's medical records indicating that he was having problems with his medication in mid-1988, Kirwan's affidavit attesting that he was disabled on the date of his termination, Dr. Bencze's affidavit attesting that Kirwan may have been totally disabled on that date, and the Social Security Administration's determination that Kirwan was totally disabled on that date. We find that this evidence presents a genuine issue of material fact as to whether Kirwan was totally disabled on the date of his termination. Accordingly, the district court erred in granting summary judgment in favor of Marriott.

Petitioner filed his physician's affidavit attesting to his total disability as of July 1996 with the district court as an attachment to his motion for partial summary judgment. Along with his motion, he attached his letter of approval from Social Security, which stated that he was disabled as of the 18th day of September. Therefore, the question of petitioner's disability at the time of his application for long-term disability benefits creates a genuine issue of material fact.

The petitioner has asserted a claim against the respondent, Liberty Life, for long-term disability benefits under a company sponsored benefit plan. Liberty Life has

argued that the Eleventh Circuit has held an arbitrary and capricious, or abuse of discretion standard of review in cases where the plan gives the administrator the discretion to interpret the provisions of that plan. *Brown v. Blue Cross and Blue Shield of Alabama*, 898 F.2d 1556 (11th Cir. 1990) They argue that *Brown, supra*, gives Liberty Life this discretion because Liberty Life's policy states:

> We shall posess the authority, in our sole discretion, to construe the terms of this plan and to determine benefit eligibility thereunder. Our decisions regarding construction of the terms of this plan and benefit eligibility shall be conclusive and binding.

This argument would work well for the respondent, Liberty Life, if they had appointed themselves as the plan administrator or fiduciary of BHIC's long-term disability policy. However, the named plan administrator for BHIC's long-term disability plan through Liberty Life is Bill Harbert International Construction. In *Kirwan v. Marriott Corporation*, 10 F.3d 788, the Eleventh Circuit states:

> Kirwan argues that the district court should have applied a de novo standard of review to the Administrator's denial of benefits. We agree. In *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989), the Supreme Court held that 'a denial of benefits challenged under §1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefits plan gives the administrator or the fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.' The Supreme Court subjected Firestone's denial of benefits to de novo review

> because 'there is no evidence that under Firestone's . . . plan the administrator has the power to construe the uncertain terms or that eligibility determinations are to be given deference.'

Although Liberty Life retained the right to possess the authority to construe the terms of the plan and to determine benefit eligibility, it does not name itself as the plan administrator. It gives that responsibility to respondent BHIC. In *Kirwan, supra,* the Eleventh Circuit goes on to state:

> This circuit has interpreted *Bruch* to mandate de novo review unless the plan expressly provides the administrator discretionary authority to make eligibility determinations or to construe the plan's terms. Thus, the Eleventh Circuit has applied the arbitrary and capricious standard when the plan provides that the administrators ' "determinations shall be final and conclusive' " so long as they are ' "reasonable determinations which are not arbitrary and capricious.' " The Eleventh Circuit has also applied the arbitrary and capricious standard when the plan confers upon the administrator ' "full and exclusive authority to determine all questions of coverage and eligibility' " and ' "full power to construe the provisions' " of the plan. On the other hand, the Eleventh Circuit has applied the de novo standard when the plan confers upon the administrator the authority to make initial eligibility determinations ' "according to the terms of the Plan.' "

The Employee Retirement Income Security Act of 1974, §502(a)(1)(B), as amended, 29 U.S.C.A. §1132(a)(1)(B) states "District court conducting de novo review of

employee benefit plan administrator's benefits determination is not limited to facts available to administrator at time of determination." Although Liberty Life retained the authority to construe the terms of the plan, to determine benefit eligibility and to make that authority conclusive and binding, they did not name themselves as the plan administrator or the plan fiduciary. Therefore, they could not review the petitioner's claim under the arbitrary and capricious standard. The district court disregards this argument because the petitioner would not have been eligible for benefits under either plan anyway. However, considering the above referred to facts, the petitioner's application should have been reviewed under the de novo standard, taking into account his disability previous to his termination, and his notification to the respondent, Heeschan, in the early morning of September 18, 1997.

Lastly, the panel erred in that it deviated from its prior rulings in *Kirwan v. Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994) and *Whatley v. CNA Insurance Company*, 1895 F.3d 1310 (C.A. 11 (Ala.) 1999) in that the Petitioner's issues and facts are similar to both cases. Like Fulk, Kirwan was able to work up until the date of his termination. Previous to his termination, Kirwan, like Fulk, suffered from a condition, which caused him to be permanently and totally disabled. (*Kirwan*, pp. 785-786) Kirwan filed for long-term disability benefits approximately eight months after his termination. (*Kirwan*, p. 786) Fulk applied for his long-term disability benefits on the date of his termination while under the impression that he had MetLife/Travelers long-term disability insurance which allowed him to file up until the end of the

month in which he was terminated. Kirwan's physician, like Fulk's, submitted an affidavit stating that he was totally disabled as of February 8, 1990 and that she could not exclude that he had been totally disabled prior to that date. (*Kirwan*, pp. 784, 786) Fulk presented evidence to the Eleventh Circuit from his physician that he was totally disabled prior to his date of termination. Both Kirwan and Fulk presented evidence from Social Security of a total disability and both have received benefits based upon that total disability. The Eleventh Circuit reversed and remanded *Kirwan* based upon the fact that Kirwan presented genuine issues of fact as to whether he was totally disabled on the date of his termination. (*Kirwan* p. 790)

Whatley v. CNA Ins. Companies, 189 F.3d 1310 (C.A. 11 (Ala.) 1999) is a case reversed by the Eleventh Circuit with issues and facts equal to those in *Fulk*. Whatley was able to come to work, perform some tasks and collect a paycheck until his date of termination. (*Whatley* p. 1312) He had suffered from numerous ailments prior to his termination for which he received medical attention. (*Whatley* p. 1312) Whatley was terminated on October 2, 1995, and applied for long-term disability benefits approximately six months later in April of 1996. (*Whatley* p. 1312) CNA denied coverage since Whatley was still able to work and his total disability would not be covered. (*Whatley* p. 1312) The District Court granted summary judgment holding as a matter of law that he did not qualify for benefits under the disability plan because he had been able to work up until termination and could not have been disabled until after that date. (*Whatley* p. 1310)

Whatley submitted to the court evidence from his physician that he was disabled on October 2, 1995 and he also submitted deposition testimony that as of September of 1995, his disability would have made it difficult for him to perform day-to-day. (*Whatley* p. 1313) Additionally, Whatley applied for and was awarded Social Security Disability benefits retroactive to October 2, 1995. (*Whatley* p. 1310) The Eleventh Circuit held that the evidence submitted by Whatley presented a genuine issue of material fact as to whether Whatley was totally disabled on the date of his termination and the summary judgment against him was vacated and the case was remanded. (*Whatley* p. 1311)

CONCLUSION

Larry Fulk has been forced to go through three years of pain, suffering and loss of income simply because his employer did not familiarize itself with the requirements of ERISA and the procedures required by an employer under ERISA. Although he has adequately proved that he was disabled prior to his date of termination and he has sufficiently proved that his employer, in violation of ERISA, concealed from him that it had terminated an existing long-term disability plan and put in place an entirely different plan with material changes as to when he could file for disability, Mr. Fulk's case has been ignored by prior courts. He has continued to suffer because the United States District Court and the Eleventh Circuit Court of Appeals failed to give the issues and facts of his case full attention and consideration. Both courts simply denied Mr. Fulk's repeated requests to

review the facts and the law. The facts of this case show that Mr. Fulk's intention in continuing to work while disabled stemmed from his strong work ethic and desire to finish the job that he started with his employer. ERISA was put into place to protect employees such as Mr. Fulk but has in this instance failed him because of the lack of attention given to his case by the lower court. Therefore, Mr. Fulk respectfully requests this Honorable Court to review the issues, facts, and arguments of his case and grant his writ of certiorari.

Dated: October 11, 2000

Respectfully submitted,

JOHN F. KIZER, JR.
JOHN F. KIZER, JR., LLC
215 North Richard Arrington, Jr. Blvd.
Suite 301
Birmingham, Alabama 35203
(205) 324-1582

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12426
Non-Argument Calendar

D.C. Docket No. 98-01076-CV-P-W

LARRY A. FULK,

Plaintiff-Appellant,

versus

BILL HARBERT INTERNATIONAL CONSTRUCTION COMPANY, INC., a corporation, d.b.a. Bill Harbert; LIBERTY LIFE ASSURANCE COMPANY OF BOSTON, d.b.a. Liberty Mutual, a corporation, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(March 24, 2000)

Before COX, BIRCH, and CARNES, Circuit Judges.

PER CURIAM:

Larry Fulk appeals the denial of a motion to remand and the awarding of summary judgment to certain defendants in his suit alleging violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994) & Supps. II & III) (ERISA). We affirm

both rulings of the district court after reviewing them de novo. *See, e.g., Glass v. United of Omaha Life Ins. Co.*, 33 F.3d 1341, 1344-45 (11th Cir. 1994) (summary judgment); *Whitt v. Sherman Int'l Corp.*, 147 F.3d 1325, 1329 (11th Cir. 1998) (denial of a motion to remand).

Fulk's argument that the district court erred in denying his motion to remand an ERISA case is patently meritless and we affirm the denial accordingly. Nor has Fulk demonstrated reversible error in the granting of summary judgment in favor of Bill Harbert International Construction, Inc. (BHIC) and Liberty Life Assurance Company (Liberty Life). BHIC amended rather than terminated the plan when it switched insurance carriers, *see* 29 U.S.C. § 1002(1) (defining "plan"); *Donovan v. Dillingham*, 688 F.2d 1367, 1375 (11th Cir. 1982) ("The purchase of insurance is only a method of implementing a plan . . . and is evidence of the existence of a plan but is not itself a plan."), and in so doing, it did not act as a plan fiduciary, *see Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 763 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-91, 116 S. Ct. 1783, 1789-90 (1996) (both holding that employers sponsoring ERISA plans do not, under 29 U.S.C. § 1002(21)(A), act as fiduciaries when they "alter the terms of a plan"). Under 29 U.S.C. § 1132(a)(3), plaintiffs may sue nonfiduciaries for "appropriate equitable relief," but not for (as Fulk seeks) compensatory and punitive damages. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251-63, 113 S. Ct. 2063, 2066-72 (1993). Fulk therefore

failed to state a cognizable claim for damages against BHIC.[1]

Liberty Life, on the other hand, was a plan fiduciary. The district court reached no conclusion, however, regarding whether Liberty Life possessed discretionary authority to determine eligibility for benefits under the plan. The court therefore could not determine whether Liberty Life's actions should have been reviewed de novo or only to determine whether they were arbitrary and capricious. *Compare Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1563 (11th Cir. 1990) (holding that actions of fiduciaries empowered to construe uncertain plan terms and make discretionary eligibility and coverage decisions should be reviewed under the "arbitrary and capricious" standard, although the standard might involve higher scrutiny than its name suggests where the fiduciary profits from the plan) *with Kirwan v. Marriott Corp.*, 10 F.3d 784, 788-89 (11th Cir. 1994) (holding de novo review appropriate where the fiduciary lacks such discretionary authority under the plan). We agree with the district court that a conclusion about the standard of review is unnecessary because we find no reversible error in the district court's conclusion that Fulk

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[1] We also affirm the district court's grant of summary judgment in favor of BHIC employee Susan Walker Heeschen because Fulk had no claim against Heeschen at the time the summary judgment order was entered. Earlier in the litigation, the district court struck Fulk's claims for compensatory damages against BHIC and Heeschen. Although Fulk amended his prayer for relief against BHIC, he failed to amend his claim against Heeschen, an omission which is explained neither in the record nor in Fulk's briefs before this court.

raised no disputed issue of material fact regarding whether Liberty Life acted inappropriately under either standard.[2]

AFFIRMED.

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[2] BHIC's request for a discretionary award of attorney's fees under 29 U.S.C. § 1132(g)(1) is denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

LARRY A. FULK Plaintiff, -vs- BILL HARBERT INTERNATIONAL CONSTRUCTION, ET AL. Defendant.	)	No. CV-98-P-1076-S

ORDER

(Filed July 7, 1999)

The plaintiff's Motion for Reconsideration, Motion for Partial Summary Judgment, and Motion for Remand were all taken under submission by the Court at a special setting on June 21, 1999. The Court also took under submission at that time the Motion for Summary Judgment of Defendants Harbert and Heeschen, the Motion for Summary Judgment of Defendant Liberty Life and the Motion to Strike of Defendants Harbert and Heeschen. For the reasons expressed in the accompanying opinion, the plaintiff's motion for reconsideration is hereby GRANTED. The plaintiff's motion for partial summary judgment is hereby DENIED. The plaintiff's motion to remand is hereby DENIED. Defendants Harbert and Heeschan's motion for summary judgment is hereby GRANTED. Defendant Liberty Life's motion for summary judgment is hereby GRANTED. The defendants' motion to strike is MOOT.

Costs are taxed against the plaintiff.

Dated: July 6, 1999

/s/ Sam C. Pointer, Jr.
Chief Judge
Sam C. Pointer, Jr.

Service List:
John F. Kizer
Melissa B. Collins
Barry V. Frederick
Jennifer F. Swain
Samuel H. Franklin
Wynn M. Shuford

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

LARRY A. FULK Plaintiff, -vs- BILL HARBERT INTERNATIONAL CONSTRUCTION, ET AL. Defendant.	)	No. CV-98-P-1076-S

OPINION

(Filed July 7, 1999)

At a special setting on June 21, 1999, the Court heard oral argument on the following motions in this case: 1 Plaintiff's Motion for Reconsideration of Denial of Partial Summary Judgment; 2) Plaintiff's Motion for Partial Summary Judgment; 3) Plaintiff's Motion for Remand; 4) Defendant Bill Harbert, Inc. and Defendant Susan Walker Heeschen's Motion for Summary Judgment; 5) Defendant Liberty Life's Motion for Summary Judgment; and 6) Defendants Harbert and Heeschen's Motion to Strike. For the reasons expressed below, Plaintiff's Motion for Reconsideration is due to be granted, but his Motion for Partial Summary Judgment is due to be denied. Plaintiff's Motion for Remand is also due to be denied. The Summary Judgment motions of Bill Harbert, Inc., Susan Walker Heeschen, and Liberty Life are due to be granted. The Defendants' Motion to Strike is due to be dismissed as moot.

Facts[1]

The plaintiff was employed by Defendant Bill Harbert International Construction, Inc. ("Harbert") as a Project Supervisor at the Trussville Wastewater Treatment Plant. When he was hired, the plaintiff was provided information about Harbert's long-term disability coverage through Traveler's Insurance. In August, 1995, Harbert transferred its long-term disability coverage to Met Life. Both the Travelers and Met Life plans covered employees to the end of the month in which the premiums were paid, effectively continuing coverage to the end of the month in which an employee was terminated.

In August of 1997, Harbert again switched long-term disability insurance carriers to Liberty Life Assurance Company ("Liberty Life"). This change was effective on September 1, 1997. Harbert did not notify the plaintiff of the change until September 18, 1997, when the plaintiff was terminated.

The plaintiff has suffered from cardiac disease since 1996. Although he was advised by his physician in July of 1996 to file for disability benefits, the plaintiff did not do so. The plaintiff continued to work, although he used an ATV "four wheeler" to get around and spent the majority of his time in the office rather than the field.

On the morning of September 18, 1997, two Harbert employees told the plaintiff that he was terminated. That same morning, the plaintiff notified Defendant Susan Walker Heeschen, Harbert's Plan Administrator, that he

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[1] the recitation of "facts" is based upon the presented materials viewed in the light most favorable to the plaintiff.

intended to file for long-term disability benefits. Heeschen told the plaintiff that his benefits terminated that day. The next day, on September 19, the plaintiff faxed Heeschen a letter restating what he had told her the day before and referencing the Travelers Insurance benefit plan. On September 22, Defendant Heeschen told him that the company had changed insurance carriers to Liberty Life as of September 1, 1997. At that time, the plaintiff requested a copy of the Liberty Life Handbook, which he did not receive until November 1997, in October 1997 the plaintiff filed for long-term disability benefits with Liberty Life. In January of 1998, Liberty Life informed the plaintiff that his request for benefits had been denied.

The plaintiff filed suit on April 3, 1998 in the Circuit Court of Jefferson County, Alabama. He alleges that Defendants Harbert and Heeschen breached a fiduciary duty to notify him that a significant change to the benefit plan was under consideration. Both this claim, and the plaintiff's claim against Liberty Life for denial of benefits allege violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132. The case was removed to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1446.

Analysis

I. Plaintiff's Motion for Reconsideration

After removal to federal court, this case was originally assigned to Judge Seybourn H. Lynne in the Northern District of Alabama. On December 7, 1998 it was reassigned to the undersigned. The plaintiff requests that

his motion for Partial Summary Judgment, previously denied by Judge Lynne, be reconsidered at this time. As this motion is unopposed by the defendant, the Motion for Reconsideration is due to be granted.

II. Plaintiff's Motion for Partial Summary Judgment

The plaintiff argues that Defendants Harbert and Heeschen had a fiduciary duty to notify him that a new benefit plan was under serious consideration. He was terminated, and he continued to work until the day of his termination.

ERISA requires that plan administrators furnish summaries of new amendments to beneficiaries within 210 days after the end of the plan year in which the amendment was adopted, 29 U.S.C. § 1024(b)(1); *Curtiss-Wright Corp. v. Schooneiongen*, 514 U.S. 73, 83 (1995). The plaintiff was notified of the defendants' decision to switch insurance carriers within that time period. Additionally, ERISA generally permits employers to modify, adopt and terminate benefit plans. *Curtiss-Wright*, 514 U.S. at 78. The defendants were free to change insurance carriers or modify the existing plan to the extent that benefits would terminate as of the date that an employee separated from the company.

The plaintiff continued to work until the day of his termination and did not assert that he was disabled or file for benefits until after his termination. Even if the defendants had notified the plaintiff prior to his termination of the switch to Liberty Life and that Liberty did not extend plan benefits beyond the date of termination, the plaintiff

would still not have been in a position to receive those benefits because he continued to be able to do his work. The defendants' failure to notify plaintiff while still working of this change – as distinguished from the change itself – did not adversely affect the plaintiff. For these reasons, the plaintiff's motion is due to be denied.

III. Plaintiff's Motion for Remand

The plaintiff seeks a remand to the Circuit Court of Jefferson County. The plaintiff argues that ERISA is inapplicable to his case because these were no written plan booklets or brochures from Liberty Life available at the time of his termination. However, the plaintiff's claims fall under ERISA because at the time of the denial of benefits, the defendants had a long-term disability benefits plan in place. At no time during the period between the plaintiff's employment with Harbert and his filing for disability benefits was there a lapse in coverage by an ERISA–covered insurance plan. The plaintiff was notified of the switch to Liberty Life well within the time period required by ERISA and received the new booklets when they were available. Removal was proper under 29 U.S.C. § 1132(e)(1). Accordingly, the plaintiff's Motion for Remand is due to be denied.

IV. Defendant Bill Harbert, Inc. and Defendant Susan Walker Heeschen's Motion for Summary Judgment

The plaintiff seeks compensatory and punitive damages from Defendants Harbert and Heeschen, alleging that their breach of fiduciary duty in failing to notify him

of the change in insurance carriers caused the denial of his long-term disability benefits. ERISA authorizes suits for "appropriate equitable relief," but does not authorize suits for money damages against third-parties. *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). The plaintiff's sole cognizable claim for denial of benefits would lie against Liberty Life if this claim could withstand a summary judgment motion. Accordingly, the Motion for Summary Judgment of Defendants Harbert and Heeschen is due to be granted.

V. Defendant Liberty Life's Motion for Summary Judgment

Liberty Life argues that it was well within its discretionary authority to deny benefits to the plaintiff. Generally, the decision by an insurance company to deny benefits is subject to an "abuse of discretion" or "arbitrary and capricious" standard of review. *Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1556, 1563 (11th Cir. 1990). The plaintiff responds that under *Kirwan v. Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994), a de novo standard of review should apply to Liberty Life's decision to deny benefits. The Court does not reach the question of the proper standard of review because, regardless of whether the de novo standard or the stricter "arbitrary and capricious" standard is applied, Liberty Life's Motion for Summary Judgment is due to be granted.

The plaintiff applied for disability benefits after he was informed of his termination by Harbert. He did not notify Harbert, Plan Administrator Heeschen, Met Life or Liberty Life of his intention to file for long-term disability

benefits, nor did he attempt to file for them, prior to his termination. The Liberty Life plan, as well as its predecessor, provides that disability benefits are not available to an employee who is able to perform all of the material and substantial duties of his employment. As noted, under the Liberty Life plan, this disability must occur prior to the date the participant's employment terminates. Furthermore, the plan's coverage ends when an employee ceases to work for the company. Liberty Life did not abuse its authority in reviewing the plaintiff's application. Although his cardiac disease may have made working more difficult he worked up until the day of his termination. As noted above, even if the plaintiff had known of the switch in insurance carriers, he would have been unable to qualify for long-term disability benefits while he was still able to perform his duties. Accordingly, the motion for summary judgment is due to be granted because Liberty Life's denial of benefits would be permissible even under the least deferential standard of review.

VI. Defendants Harbert and Heeschen's Motion to Strike

The Motion to Strike the plaintiff's claim for benefits is moot because the defendants' motions for summary judgment are due to be granted.

Dated: July 6, 1999

/s/ Sam C. Pointer, Jr.
Chief Judge
Sam C. Pointer, Jr.

Service List:

John F. Kizer
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Jennifer F. Swain
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Wynn M. Shuford

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-12426-CC

LARRY A. FULK,

Plaintiff-Appellant,

versus

BILL HARBERT INTERNATIONAL CONSTRUCTION COMPANY, INC., a corporation, D.B.A Bill Harbert; LIBERTY LIFE ASSURANCE COMPANY OF BOSTON d.b.a. Liberty Mutual, a corporation, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion ___, 11th Cir., 19___, ___F.2d___).

(Filed Jul. 14, 2000)

Before: COX, BIRCH, and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E. R. Cox
UNITED STATES CIRCUIT JUDGE